



**6712-01**

**FEDERAL COMMUNICATIONS COMMISSION**

**47 CFR Part 54**

**[CC Docket No. 02-6; GN Docket No. 09-51; DA 14-712]**

Schools and Libraries Universal Service Support Mechanism, a National Broadband Plan for Our Future

**AGENCY:** Federal Communications Commission.

**ACTION:** Final rule.

**SUMMARY:** In this Order, the Wireline Competition Bureau revises its guidance for the E-rate program with respect to the requirement that applicants deduct from their E-rate funding requests the value of ineligible services bundled with services eligible for E-rate support, a process referred to in the E-rate program as cost allocation. The 2010 Clarification Order permitted, under limited circumstances, E-rate applicants to seek E-rate support for purchases of eligible services bundled with ineligible components without providing a cost allocation separating out the value of the ineligible components. The Wireline Competition Bureau finds that, allowing E-rate applicants to purchase bundles of eligible products or services and ineligible components without deducting the value of the ineligible components risks having the universal service fund (Fund) overpay for services and resulted in applicant and service provider confusion. The Wireline Competition Bureau determined that E-rate applicants must deduct the value of ineligible components bundled with eligible services unless those ineligible components qualify as “ancillary” to the eligible services under the Commission’s rules.

**DATES:** Effective **[INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

**FOR FURTHER INFORMATION CONTACT:** Cara Voth, Attorney, Wireline Competition Bureau, (202) 418-0025; Bryan Boyle, Attorney, Wireline Competition Bureau, (202) 418-7924 or TTY: (202) 418-0484.

**SUPPLEMENTARY INFORMATION:** This is a summary of the Wireline Competition Bureau’s Order in CC Docket No. 02-6 and GN Docket No. 09-51; DA 14-712, released on May 23, 2014. The

full text of this document is available for public inspection during regular business hours in the FCC Reference Center, Room CY-A257, 445 12th Street, SW., Washington, DC 20554 or at the following Internet address: [http://transition.fcc.gov/Daily\\_Releases/Daily\\_Business/2014/db0523/DA-14-712A1.pdf](http://transition.fcc.gov/Daily_Releases/Daily_Business/2014/db0523/DA-14-712A1.pdf).

## **I. INTRODUCTION**

1. In this Order, the Wireline Competition Bureau (Bureau) revises our guidance for the E-rate program (more formally known as the schools and libraries universal service support program) with respect to the requirement that applicants deduct from their E-rate funding requests the value of ineligible services bundled with services eligible for E-rate support, a process referred to in the E-rate program as cost allocation. The 2010 Clarification Order permitted, under limited circumstances, E-rate applicants to seek E-rate support for purchases of eligible services bundled with ineligible components without providing a cost allocation separating out the value of the ineligible components. Beginning in funding year 2015, we once again require E-rate recipients to cost allocate ineligible components that are bundled with eligible products or services, even under the limited circumstances allowed for by the 2010 Clarification Order. Based on our review of the record, we find that allowing E-rate applicants to purchase bundles of eligible products or services and ineligible components without deducting the value of the ineligible components risks having the federal universal service fund (Fund) overpay for services, and resulted in applicant and service provider confusion. We therefore determine that E-rate applicants must deduct the value of ineligible components bundled with eligible services unless those ineligible components qualify as “ancillary” to the eligible services under the Commission’s rules. This revised interpretation of our rules shall be effective beginning in funding year 2015.

## **II. DISCUSSION**

2. Based on our review of the record, we now adopt the proposal made in the E-rate Bundled Components Public Notice, 78 FR 23877, April 23, 2013, and revise our guidance regarding cost allocation for bundles of eligible services and ineligible components to more properly align with the

Commission's cost allocation rules for the E-rate program, the best interests of the Fund, and the best interests of applicants for E-rate support. As a result, beginning with funding year 2015, E-rate recipients must cost allocate non-ancillary ineligible components that are bundled with eligible products or services, including those components that previously would have fallen within the scope of components not requiring cost allocation as described in the 2010 Clarification Order. Applicants may continue to seek E-rate funding for the eligible components of any bundled service offering but now must cost allocate non-ancillary ineligible components including, but not limited to, end user devices such as telephone handsets, VoIP handsets, computers, cell phones, and other components that are not eligible for E-rate discounts. We make no other changes to the gift guidance in the 2010 Clarification Order. If a gift was prohibited prior to today's Order, it remains prohibited by our rules.

3. The record persuades us that the 2010 Clarification Order guidance, which was focused on providing a further explanation of the Commission's E-rate program gift rules, is not the best reading of the Commission's rules because it did not fully consider the interplay between the gift rules and cost allocation requirements. As a result, the guidance in that order created substantial uncertainty for applicants and service providers about which ineligible components were required to be cost allocated. Moreover, because the 2010 Clarification Order did not impose limitations on what types of equipment or services could be bundled, we have become increasingly concerned that it unintentionally created risk that bundled offerings could result in expenditures for ineligible equipment or services that could drain the resources available for eligible equipment or services.

4. The 2010 Clarification Order guidance has proven to be incompatible with the Commission's E-rate rules regarding eligible services and cost allocation, which serve to prevent the E-rate program from paying for more than just eligible services. Permitting E-rate support for bundled ineligible components without requiring cost allocation creates the risk that E-rate funds will pay for ineligible services, leaving less money for eligible services. The Commission's ongoing commitment to strong stewardship of the Fund and to combatting waste, fraud and abuse in the E-rate program requires

us to strive to ensure that E-rate support is not diverted to ineligible services, and the interpretation of our rules adopted here helps guard against that risk.

5. In addition, we have found that the 2010 Clarification Order has caused confusion over the interplay between that order and the Commission's cost allocation rules. The Commission's cost allocation rules require that "[a] request for discounts for a product or service that includes both eligible and ineligible components must allocate the cost of the contract to eligible and ineligible components." By exempting some bundled offerings from those general cost allocation rules, the cost allocation guidance in the 2010 Clarification Order inadvertently created substantial tension between the guidance provided by the Bureau and the Commission's rules. Moreover, commenters expressed frustration that the 2010 Clarification Order cost allocation guidance did not make clear what products or services, other than cell phones, did not require cost allocation. Rescinding the cost allocation guidance of the 2010 Clarification Order and once again requiring cost allocation of all non-ancillary ineligible components of a bundle reflects the best reading of Commission rules and will make it easier for applicants to determine what must be cost allocated. We agree with the commenter who stated that the longstanding cost allocation requirement is "a simple and conceptually sound approach."

6. Some commenters recommended that the Bureau reaffirm the cost allocation language in the 2010 Clarification Order, but limit its reach to bundles of cell phone handsets and service. Having a separate cost allocation policy for cell phones might be a practical approach to address the difficulties in assessing equipment price, but allowing bundling without cost allocation, even in relatively narrow circumstances, is in tension with the Commission's rules. Moreover, treating bundles of cell phones and cell phone service differently than other bundles of eligible services and ineligible components is inconsistent with the Commission's general commitment to technological neutrality, and risks having the E-rate program funds overpay for cell phone service. Requiring cost allocation for all bundled ineligible components, including cell phones, comports more fully with Commission rules.

7. Some commenters argue that we should maintain the guidance in the 2010 Clarification Order because bundling eligible and ineligible services is often the most economical way for E-rate recipients to receive services. But under today's decision, E-rate applicants may continue to achieve those economies by purchasing bundles containing eligible products or services and ineligible components. They are merely required to deduct the value of these ineligible components from their funding requests when they seek discounts for purchases of bundled services. In practical terms, this means that when applicants submit requests for funding on an FCC Form 471, they must identify which costs in the bundle are eligible and which costs are ineligible.

8. Several commenters have asked for guidance on the Commission's cost allocation requirements. We recognize that, as explained above, cost allocation requires some administrative effort, but compliance with the requirement is relatively simple. Under the Commission's rules, if a product or service contains ineligible components, costs should be allocated to the extent that a clear delineation can be made between the eligible and ineligible components. The clear delineation must have a tangible basis and the price for the eligible portion must be the most cost-effective means of receiving the eligible service.

9. Finally, as explained above, cost allocation is not required for ineligible ancillary components as defined by the Commission's rules. Although some commenters recommend amending the definition of "ancillary", a substantive change to the Commission's rule on ancillary components is beyond the scope of this proceeding. We remind applicants that the definition of ancillary requires that the price for the otherwise ineligible component cannot be determined separately and independently from the price of the eligible components, and that the specific service which contains the ineligible ancillary component remains the most cost-effective way for the applicant to receive that service. USAC reviews requests for E-rate funding to ensure that any ineligible components deemed as ancillary to eligible services are truly ancillary under the Commission's definition.

### **III. PROCEDURAL MATTERS**

#### **A. Final Regulatory Flexibility Analysis**

10. As required by the Regulatory Flexibility Act of 1980, as amended (RFA), the Wireline Competition Bureau (Bureau) included an Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on a substantial number of small entities by the policies and rules proposed in the E-rate Bundled Components Public Notice in CC Docket No. 02-6 and GN Docket No 09-51. The Bureau sought written public comment on the proposals in the E-rate Bundled Components Public Notice, including comment on the IRFA. This Final Regulatory Flexibility Analysis (FRFA) conforms to the RFA.

#### **B. Need for, and Objectives of, the Proposed Rule**

11. This Order continues the Bureau's efforts to simplify the E-rate program and encourage the prudent use of limited E-rate funds. In it, we clarify that beginning with applications seeking discounts for E-rate funding year 2015, any ineligible components must be cost allocated, even if bundled with E-rate eligible services and offered to the public or some class of users. The prudent use of limited E-rate funding and clarity about E-rate rules are important to the long-term efficacy of the federal universal service fund (Fund). This clarification will help to achieve the Commission's goal of maintaining Fund solvency and providing clear rules for E-rate recipients.

#### **C. Summary of Significant Issues Raised by Public Comments to the IRFA**

12. No comments specifically addressed the IRFA.

#### **D. Description and Estimate of the Number of Small Entities to Which the Proposed Rules May Apply**

13. The RFA directs agencies to provide a description of and, where feasible, an estimate of the number of small entities that may be affected by the proposed rules, if adopted. The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small

organization,” and “small governmental jurisdiction.” In addition, the term “small business” has the same meaning as the term “small business concern” under the Small Business Act. A small business concern is one that: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA). Nationwide, there are a total of approximately 28.2 million small businesses, according to the SBA. A “small organization” is generally “any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.”

14. Nationwide, as of 2002, there were approximately 1.6 million small organizations. The term “small governmental jurisdiction” is defined generally as “governments of cities, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand.” Census Bureau data for 2002 indicate that there were 87,525 local governmental jurisdictions in the United States. We estimate that, of this total, 84,377 entities were “small governmental jurisdictions.” Thus, we estimate that most governmental jurisdictions are small.

15. Small entities potentially affected by the proposals herein include eligible schools and libraries and the eligible service providers offering them discounted services.

16. Schools and Libraries. As noted, “small entity” includes non-profit and small government entities. Under the schools and libraries universal service support mechanism, which provides support for elementary and secondary schools and libraries, an elementary school is generally “a non-profit institutional day or residential school that provides elementary education, as determined under state law.” A secondary school is generally defined as “a non-profit institutional day or residential school that provides secondary education, as determined under state law,” and not offering education beyond grade 12. For-profit schools and libraries, and schools and libraries with endowments in excess of \$50,000,000, are not eligible to receive discounts under the program, nor are libraries whose budgets are not completely separate from any schools. Certain other statutory definitions apply as well. The SBA has defined for-profit, elementary and secondary schools and libraries having \$6 million or less in annual

receipts as small entities. In funding year 2007, approximately 105,500 schools and 10,950 libraries received funding under the schools and libraries universal service mechanism. Although we are unable to estimate with precision the number of these entities that would qualify as small entities under SBA's size standard, we estimate that fewer than 105,500 schools and 10,950 libraries might be affected annually by our action, under current operation of the program.

17. Telecommunications Service Providers. First, neither the Commission nor the SBA has developed a size standard for small incumbent local exchange services. The closest size standard under SBA rules is for Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees. According to Commission data, 1,307 incumbent carriers reported that they were engaged in the provision of local exchange services. Of these 1,307 carriers, an estimated 1,006 have 1,500 or fewer employees and 301 have more than 1,500 employees. Thus, under this category and associated small business size standard, we estimate that the majority of entities are small. We have included small incumbent local exchange carriers in this RFA analysis. A "small business" under the RFA is one that, inter alia, meets the pertinent small business size standard (e.g., a telephone communications business having 1,500 or fewer employees), and "is not dominant in its field of operation." The SBA's Office of Advocacy contends that, for RFA purposes, small incumbent local exchange carriers are not dominant in their field of operation because any such dominance is not "national" in scope. We have therefore included small incumbent carriers in this RFA analysis, although we emphasize that this RFA action has no effect on the Commission's analyses and determinations in other, non-RFA contexts.

18. Second, neither the Commission nor the SBA has developed a definition of small entities specifically applicable to providers of interexchange services (IXCs). The closest applicable definition under the SBA rules is for wired telecommunications carriers. This provides that a wired telecommunications carrier is a small entity if it employs no more than 1,500 employees. According to the Commission's 2010 Trends Report, 359 companies reported that they were engaged in the provision



of interexchange services. Of these 300 IXC's, an estimated 317 have 1,500 or fewer employees and 42 have more than 1,500 employees. Consequently, the Commission estimates that most providers of interexchange services are small businesses.

19. Third, neither the Commission nor the SBA has developed a definition of small entities specifically applicable to competitive access services providers (CAPs). The closest applicable definition under the SBA rules is for wired telecommunications carriers. This provides that a wired telecommunications carrier is a small entity if it employs no more than 1,500 employees. According to the 2010 Trends Report, 1,442 CAPs and competitive local exchange carriers (competitive LECs) reported that they were engaged in the provision of competitive local exchange services. Of these 1,442 CAPs and competitive LECs, an estimated 1,256 have 1,500 or fewer employees and 186 have more than 1,500 employees. Consequently, the Commission estimates that most providers of competitive exchange services are small businesses.

20. Wireless Telecommunications Carriers (except Satellite). Since 2007, the Census Bureau has placed wireless firms within this new, broad, economic census category. Prior to that time, such firms were within the now-superseded categories of "Paging" and "Cellular and Other Wireless Telecommunications." Under the present and prior categories, the SBA has deemed a wireless business to be small if it has 1,500 or fewer employees. Because Census Bureau data are not yet available for the new category, we will estimate small business prevalence using the prior categories and associated data. For the category of Paging, data for 2002 show that there were 807 firms that operated for the entire year. Of this total, 804 firms had employment of 999 or fewer employees, and three firms had employment of 1,000 employees or more. For the category of Cellular and Other Wireless Telecommunications, data for 2002 show that there were 1,397 firms that operated for the entire year. Of this total, 1,378 firms had employment of 999 or fewer employees, and 19 firms had employment of 1,000 employees or more. Thus, we estimate that the majority of wireless firms are small.

21. Wireless telephony includes cellular, personal communications services, and specialized mobile radio telephony carriers. As noted, the SBA has developed a small business size standard for Wireless Telecommunications Carriers (except Satellite). Under the SBA small business size standard, a business is small if it has 1,500 or fewer employees. According to the 2010 Trends Report, 413 carriers reported that they were engaged in wireless telephony. Of these, an estimated 261 have 1,500 or fewer employees and 152 have more than 1,500 employees. We have estimated that 261 of these are small under the SBA small business size standard.

22. Common Carrier Paging. As noted, since 2007 the Census Bureau has placed paging providers within the broad economic census category of Wireless Telecommunications Carriers (except Satellite). Prior to that time, such firms were within the now-superseded category of “Paging.” Under the present and prior categories, the SBA has deemed a wireless business to be small if it has 1,500 or fewer employees. Because Census Bureau data are not yet available for the new category, we will estimate small business prevalence using the prior category and associated data. The data for 2002 show that there were 807 firms that operated for the entire year. Of this total, 804 firms had employment of 999 or fewer employees, and three firms had employment of 1,000 employees or more. Thus, we estimate that the majority of paging firms are small.

23. In addition, in the Paging Second Report and Order, the Commission adopted a size standard for “small businesses” for purposes of determining their eligibility for special provisions such as bidding credits and installment payments. A small business is an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding \$15 million for the preceding three years. The SBA has approved this definition. An initial auction of Metropolitan Economic Area (“MEA”) licenses was conducted in the year 2000. Of the 2,499 licenses auctioned, 985 were sold. Fifty-seven companies claiming small business status won 440 licenses. A subsequent auction of MEA and Economic Area (“EA”) licenses was held in the year 2001. Of the 15,514 licenses auctioned, 5,323 were sold. One hundred thirty-two companies claiming small business status purchased 3,724 licenses. A

third auction, consisting of 8,874 licenses in each of 175 EAs and 1,328 licenses in all but three of the 51 MEAs, was held in 2003. Seventy-seven bidders claiming small or very small business status won 2,093 licenses.

24. Currently, there are approximately 74,000 Common Carrier Paging licenses. According to the most recent Trends in Telephone Service, 291 carriers reported that they were engaged in the provision of “paging and messaging” services. Of these, an estimated 289 have 1,500 or fewer employees and two have more than 1,500 employees. We estimate that the majority of common carrier paging providers would qualify as small entities under the SBA definition.

25. Internet Service Providers. The 2007 Economic Census places these firms, whose services might include voice over Internet protocol (VoIP), in either of two categories, depending on whether the service is provided over the provider’s own telecommunications facilities (e.g., cable and DSL ISPs), or over client-supplied telecommunications connections (e.g., dial-up ISPs). The former are within the category of Wired Telecommunications Carriers, which has an SBA small business size standard of 1,500 or fewer employees. The latter are within the category of All Other Telecommunications, which has a size standard of annual receipts of \$25 million or less. The most current Census Bureau data for all such firms, however, are the 2002 data for the previous census category called Internet Service Providers. That category had a small business size standard of \$21 million or less in annual receipts, which was revised in late 2005 to \$23 million. The 2002 data show that there were 2,529 such firms that operated for the entire year. Of those, 2,437 firms had annual receipts of under \$10 million, and an additional 47 firms had receipts of between \$10 million and \$24, 999,999. Consequently, we estimate that the majority of ISP firms are small entities.

26. Vendors of Internal Connections: Telephone Apparatus Manufacturing. The Census Bureau defines this category as follows: “This industry comprises establishments primarily engaged in manufacturing wire telephone and data communications equipment. These products may be standalone or board-level components of a larger system. Examples of products made by these establishments are

central office switching equipment, cordless telephones (except cellular), PBX equipment, telephones, telephone answering machines, LAN modems, multi-user modems, and other data communications equipment, such as bridges, routers, and gateways.” The SBA has developed a small business size standard for Telephone Apparatus Manufacturing, which is: all such firms having 1,000 or fewer employees. According to Census Bureau data for 2002, there were a total of 518 establishments in this category that operated for the entire year. Of this total, 511 had employment of under 1,000, and an additional seven had employment of 1,000 to 2,499. Thus, under this size standard, the majority of firms can be considered small.

27. Vendors of Internal Connections: Radio and Television Broadcasting and Wireless Communications Equipment Manufacturing. The Census Bureau defines this category as follows: “This industry comprises establishments primarily engaged in manufacturing radio and television broadcast and wireless communications equipment. Examples of products made by these establishments are: transmitting and receiving antennas, cable television equipment, GPS equipment, pagers, cellular phones, mobile communications equipment, and radio and television studio and broadcasting equipment.” The SBA has developed a small business size standard for firms in this category, which is: all such firms having 750 or fewer employees. According to Census Bureau data for 2002, there were a total of 1,041 establishments in this category that operated for the entire year. Of this total, 1,010 had employment of under 500, and an additional 13 had employment of 500 to 999. Thus, under this size standard, the majority of firms can be considered small.

28. Vendors of Internal Connections: Other Communications Equipment Manufacturing. The Census Bureau defines this category as follows: “This industry comprises establishments primarily engaged in manufacturing communications equipment (except telephone apparatus, and radio and television broadcast, and wireless communications equipment).” The SBA has developed a small business size standard for Other Communications Equipment Manufacturing, which is having 750 or fewer employees. According to Census Bureau data for 2002, there were a total of 503 establishments in

this category that operated for the entire year. Of this total, 493 had employment of under 500, and an additional 7 had employment of 500 to 999. Thus, under this size standard, the majority of firms can be considered small.

**E. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements for Small Entities**

29. This Order reinstates the requirement that E-rate applicants cost allocate all bundled ineligible components other than those that fall under the Commission's definition of "ancillary." Cost allocation requirements are already part of § 54.504(e) of the Commission's rules, which requires a clear delineation of eligible and ineligible services that are included on an application requesting E-rate discounts. The rulemaking results in minimal additional reporting requirements.

30. The result of this rulemaking is that small entities that had not been cost allocating certain bundled ineligible components will again be required to comply with § 54.504(e) requirements for cost allocating these components. Small entities that are service providers and vendors in the E-rate program will also be required to reexamine offerings in accordance to any changed requirements.

**F. Steps Taken to Minimize the Significant Economic Impact on Small Entities, and Significant Alternatives Considered**

31. The RFA requires an agency to describe any significant, specifically small business, alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): "(1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance and reporting requirements under the rule for such small entities; (3) the use of performance rather than design standards; and (4) an exemption from coverage of the rule, or any part thereof, for such small entities."

32. This rulemaking could impose minimal additional burdens on small entities. The only additional administrative burden the rulemaking could impose on small entities, however, would be requiring them to cost allocate ineligible components that they may have presumed were exempted from the cost allocation requirements by the 2010 Clarification Order. Cost allocation requires determining the costs of eligible and ineligible components and reporting the delineation of those costs in a request for E-rate discounts on the FCC Form 471. E-rate recipients had been required to cost allocate ineligible components bundled with eligible services prior to the 2010 Clarification Order, and are already generally required to cost allocate all ineligible components.

#### **G. Report to Congress**

33. The Commission will send a copy of this Order, including this FRFA, in a report to be sent to Congress pursuant to the SBREFA. In addition, the Commission will send a copy of the Order, including the FRFA, to the Chief Counsel for Advocacy of the SBA. A copy of the Order and the FRFA (or summaries thereof) will also be published in the Federal Register.

#### **H. Paperwork Reduction Act Analysis**

34. This document contains revised information collection requirements subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104-13. It will be submitted to the Office of Management and Budget (OMB) for review under section 3507 of the PRA. We note that pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, the Commission previously sought specific comment on how it might further reduce the information collection burden on small business concerns with fewer than 25 employees.

35. In the present document, we rescind the guidance in the 2010 Clarification Order regarding cost allocation requirements in the E-rate program (more formally known as the schools and libraries universal service support program). We have determined that it is in the best interest of the E-rate program and its participants to require E-rate recipients to cost allocate ineligible components that are

bundled with eligible services and that may have been subject to the limited exemption provided by the guidance in the 2010 Clarification Order. Any information collected from applicants is limited to information explaining the cost allocation.

**I. Congressional Review Act**

36. The Bureau will include a copy of this Order in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act.

**IV. ORDERING CLAUSE**

37. Accordingly, it is ordered, that pursuant to the authority contained in sections 1 through 4, 254, and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. 151 through 154, 254, and 303(r), and authority delegated in Federal-State Joint Board on Universal Service, CC Docket No. 96-45, Third Report and Order, 12 FCC Rcd 22485, 22488 through 89, paragraph 6 (1997), this Order is adopted, effective **[INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

FEDERAL COMMUNICATIONS COMMISSION

Julie A. Veach,  
Chief,  
Wireline Competition Bureau.

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